IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

APR 12 1976
MICHAEL RODAK, JR., CLERK

No. 75-1102

CHARLES W. BOWEN, JR., d/b/a SUBURBIA NEWS DELIVERY SERVICE, RICHARD CARTABUKE d/b/a R. CARTABUKE NEWS DEL., JOSEPH DITTA and JOSEPH FAILLA, DELLA DAVIS, SOL L. GOLDBERG d/b/a PLAINVIEW NEWS DELIVERY, THEODORE MARKOWITZ d/b/a A.M.F. NEWSPAPER DELIVERY SERVICE, FRANK MIRRO and EMANUAL MIRRO d/b/a FRANDEL NEWS SERVICE, JACK POSEROW as Assignee of VALLEY STREAM NEWS SERVICE, INC., BENJAMIN and FLORENCE ROSENBLUM d/b/a STEVANS NEWS SERVICE, HOWARD B. SCHULZ and MARGARET SCHULZ d/b/a NEWSDEALER, KENNETH SWEENEY, JOHN KAHRS d/b/a NEW YORK NEWSPAPER DELIVERY, FLORAL PARK NEWS DELIVERY, INC., HUNTINGTON NEWS DELIVERY, INC., EDWARD A. SHANK d/b/a FLORAL PARK NEWS SERVICE, HARRY FOX d/b/a MERIT NEWS COMPANY, JACK GULLO d/b/a F. & M. NEWS SERVICE, WALTER GREENBERG d/b/a PARK NEWS SERVICE, SALVIN SALES CORP., HAROLD O. RATHSAM d/b/a AROL NEWSPAPER SERVICE, HUGH HOLMAN d/b/a NASSAU NEWSPAPER DELIVERY, EDWARD PERROT d/b/a LINCOLN HOME NEWS,

Petitioners,

against

NEW YORK NEWS, INC., JACK UNDERWOOD, ROBERT O. SULLIVAN, ANTHONY CATANZARO, DAVID AUERBACH, DONALD A. NIZEN, GABRIEL LEWANDER, F. M. FLYNN, WINFRED JAMES, JOHN ERWIN also known as JOHN IRWIN, SY HECHT, ERNEST SMITH, JOSEPH CONWAY, P. PASTORELLI, J. PASTORELLI, BERNARD F. SMITH, HOWARD KENT, E. DEBELLA, MRS. ARTHUR C. ELLERMAN, RAYMOND LEDDA, MICHAEL LEPORE, VICTORE LEPORE, ARNOLD BLUME, WALDO RODRIGUEZ, E. CAPAZZI, RONALD PARKHURST, W. JOUBERT, C. McNALLY, J. RABEN, CHARLES ASHDOWN, J. OCCHINO, R. CARRELL, B. SMITH, and "JOHN" REILLY (whose first name is presently unknown) and "JOHN DOE", "RICHARD ROE" and "JANE DOE", being persons whose identities are presently unknown to plaintiffs.

Petitioners' Reply and Supplemental Brief on Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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CHARLES W. BOWEN, JR., *et al.*,

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NEW YORK NEWS, INC., *et al.*,

Defendants.

Petitioners' Reply and Supplemental Brief on Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Petitioners herewith file this brief, limited to arguments first raised in the brief in opposition to our petition for certiorari,[1] pursuant to Rule 24 (4) of the Rules of this Court (Points I and II), and to an intervening matter not available at the time of our last filing, pursuant to Rule 24(5) (Point III).

[1] We do beg the Court's indulgence in taking this opportunity to correct a printer's error in our petition, being the incorrect citation of *American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, at page 31, the correct citation of which is 521 F.2d 1230 (3rd Cir. 1975).

POINT I

Since the complaints of nine of the petitioners have been dismissed, the case is ripe for review.

Respondents suggest that review now is premature because the hearing on the merits ordered by the Second Circuit, on damages caused by the combination to prevent some plaintiffs from obtaining copies of The News, has not yet been held. However, the complaints of nine petitioners who were unaffected by the illegal conspiracy found below have been dismissed. They would be denied justice by delay, as would the claims of other petitioners if we are correct in our contentions. In any event, moreover, the denial of injunctive relief is appealable under 28 U.S.C. §1292(a). In terms of administrative convenience, this case should be decided now, since after a trial (on damages only) we might find that the only rulings we would then want to appeal from would be those involved in the decision below. *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964).

POINT II

Since the respondents admit that there was no substantial conflict of testimony on the classifications of franchise dealers for McGuire Act purposes, and that the conclusions of the Second Circuit depended upon appreciation of circumstances which may admit of different interpretations, review and reversal is clearly called for here under this Court's prior decisions.

Respondents recite that they would "correct" our assertions allegedly unsupported by the record (Brief for New York News, Inc., p. 3), — but their brief is then free of any such corrections, because there are none to be made.

The News then writes that "Since there was no jury and no susbtantial conflict of testimony affected the classification of franchise dealers for McGuire Act purposes, the Court of Appeals was fully competent to make the required determination." (*Id.* at 5). The News goes on to recite that "At most, petitioners' Point I shows only that the conclusions of the Second Circuit depended upon appreciation of circumstances which may admit of different interpretations." (*Id.* at 6). But if this were true, these very statements of The News show that certiorari should be granted and the decision below reversed, taking these statements of The News at their face value.

Were the evidence conflicting, then, as this Court has held, it would be error for an appellate court "to reevaluate the conflicting evidence and mandate a result opposite from that reached by the jury", since there was an evidentiary basis for the jury's verdict. *Basham* v. *Pennsylvania Railroad Co.*, 372 U.S. 699, 700 (1963). If the question were one of conflicting inferences, we note

that in *Lavender* v. *Kurn*, 327 U.S. 645 (1946), this Court reversed the Supreme Court of Missouri in setting aside a jury verdict, on the ground that there was a reasonable basis in the trial record to support the jury's verdict, even though the verdict was based upon an inference. In support of such conclusion, this Court stated:

> "The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury." *Id.* at 652-653.

Similarly, if there was no dispute, but the evidence was such that fair-minded men might draw different inferences, the decision may not be reversed by the appellate court, unless there is a complete absence of probative facts to support the conclusion. Thus, this Court went on to recite in *Lavender, supra,* as follows:

> "Whenever facts are in dispute *or the evidence is such that fair-minded men may draw different inferences,* a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. *Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.* But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court

> might draw a contrary inference or feel that another conclusion is more reasonable." (*Id.* at 653; emphasis supplied.)

In a non-jury case, of course, the trial judge's findings of fact and inferences drawn therefrom are entitled to the same weight as the verdict of a jury. *McAllister* v. *United States,* 348 U.S. 19, 20.

Thus, the trial Court having made the finding showing the relationship between the franchise dealers and the carrier boys for McGuire Act purposes,[2] and viewing the case entirely as The News views it here, the decision below is clearly erroneous, and review should be granted.

Respondents attempt to explain their admissions in trial colloquy by reciting, at p. 6, that "* * * these were affected by petitioners' delay until mid-trial to announce their new theory that franchise dealers should be classified as wholesalers for McGuire Act purposes (860a)." Not so: during the undersigned's very opening, he argued that "The News sells its copies of the newspapers to the

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[2] The News opines in its brief that "The trial Court's opinion had neglected altogether to make any findings as to how franchise dealers and their carrier boys actually function which would show the substance of their relationships for McGuire Act purposes." (Brief of New York News, Inc. p. 5). This is totally incorrect. Thus, after defining the term wholesaler "as one whose business is the selling of goods in gross to retail dealers", the trial Court recited that "* * * The News' franchise dealers also function as wholesalers in selling to their carrier boys * * *" (1281a, reproduced as 26a in our petition for certiorari.) Since this fact was totally undisputed at the trial, it is not surprising that the trial Court devoted such small verbiage to this aspect of the matter. But, certainly there was no "right thus to supplement the trial court's fact findings", as respondents argue at p. 5; the finding of the Second Circuit was totally contradictory to the District Court's finding, not supplemntal thereto.

franchise dealers who in turn wholesale the newspapers to the boys * * *". (47a; emphasis supplied.) Moreover, admissions in trial colloquy as to the franchise dealers being wholesalers, as well as testimony of The News and others showing that they were wholesalers, occurred *after* what respondents insist was the announcement of our new theory. Thus, such an admission can be found at 914a-915a; while there was uncontradicted testimony of the defendants and other witnesses to the effect that the franchise dealers were wholesalers, found at 1140a; 1136a-1137a, Pl. Ex. 84; 915a-916a; 907a, 908a. Moreover, defense counsel conceded after our supposed announcement of a "new" theory that there was no material dispute as to any of the facts (1038a).

In any event, a doctrine of law that admissions are not to be recognized as such because their legal significance was not realized when made is certainly inadmissible, especially when the totality of evidence completely supports the admissions, and no evidence whatsoever inconsistent therewith is at any point developed, especially since defense counsel had promised to the Court that "we will * * * frankly and fully disclose to the Court" all of the facts with regard to the operation of its franchise program (54a).

The News takes us to task because our complaint allegedly treated franchise dealers as retailers selling to consumers, as had our prior petition to this Court for certiorari on denial of summary judgment (p. 6), but this was all prior to completion of discovery, as the earlier petition for certiorari itself shows. Moreover, that petition for certiorari had nothing to do with the price fixing aspect of the case, but only with the attempt of The News and the franchise dealers to prevent certain of the petitioners from obtaining copies of The News. However

loosely we may have spoken in our ignorance in drawing the complaint, and in the petition for certiorari where the status of the franchise dealers as wholesalers could not have been of any moment, the fact remains that the uncontradicted evidence before the trial Court shows that the franchise dealers were wholesalers, and that the Second Circuit transgressed the requirements of Rule 52 in reversing the clearly correct finding of the trial Court, one which even respondents do not attack here as being erroneous, much less clearly erroneous.

If uncontradicted evidence and honest admissions are to be given any significance whatsoever, then this Court should grant review and reverse. Otherwise, it is open to an appellate court to totally re-evaluate trial testimony, and overrule trial judge's or jury's finding of fact even when totally supported in every way by uncontradicted evidence and admissions. And when, as here, an appellate court reverses findings of facts which are not clearly erroneous, and re-writes the record, apparently because it does not agree with this Court's decision in *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968) (see Petition, pp. 29-30), such rulings seem to threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy the United States, warranting a grant of certiorari. *Perma Mufflers* v. *Int'l Parts Corp.*, 392 U.S. 134, 136 (1968).

POINT III

Two of the respondents herein agree that certiorari should be granted.

Pursuant to Rule 24(5) of the Rules of this Court, we note supplementally that under date of March 31, 1976,

counsel for respondents Michael and Vito Lepore wrote the Clerk of this Court, as follows, in regard to our petition herein:

> "My clients do not oppose the petition for certiorari since they believe that the case raises serious questions which are applicable to the entire newspaper industry and should be considered by the Supreme Court."

CONCLUSION

Certiorari should be granted and the decision below reversed.

Respectfully submitted,

HERBERT MONTE LEVY
Attorney for Petitioners

BLEED THROUGH